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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1423

DONALD R. ELBEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Donald R. Elbel prays that a Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit to review the opinion and judgment of that Court in the consolidated cases of Donald R. Elbel, Appellant, vs United States of America, Appellee, Nos. 209-70 and 210-70, entered on October 6, 1970, affirming the denial of Petitioner's Application for Relief under Title 28, U.S.C.A., Section 2255 by the United States District Court for the District of Kansas at Topeka, Kansas.

OPINION OF THE COURT OF APPEALS

The opinion and judgment of the Tenth Circuit Court of Appeals has not yet been published. Accordingly, a copy of the opinion and judgment appears in the Appendix to this Petition as Exhibit A, page A 1.

The opinion and judgment of the Court of Appeals to be reviewed was entered on October 6, 1970.

No petition for rehearing was filed by Petitioner.

On December 31, 1970, Petitioner's Application for extension of time within which to file this Petition was approved, and the time extended to and including March 3, 1971.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

I

Did the Trial Court's Failure to Conduct a Hearing Require the Appellate Court to Accept As True All Facts Well Pleaded in the 2255 Motion?

28 U.S.C.A. 2255.

U. S. v. *Rosenberg*, 2nd Cir., 200 F2d 666, 668.

U. S. v. *Wilkins*, 2nd Cir., 348 F2d 844, 865.

Williams v. *Kaiser*, 323 U.S. 471, 89 LEd 398, 401.

U. S. v. *Sanders*, 373 U.S. 1, 10 LEd2d 148.

Kaufman v. *U. S.*, 394 U.S. 217, 22 LEd2d 227, 236.

II

Is the Petitioner Prohibited from a Collateral Attack on an "Instruction" Which Clearly Violates His Constitutional Right?

Roe v. *U. S.*, 5th Cir., 287 F2d 435, 440.

United Brotherhood et al. v. *U. S.*, 330 U.S. 395, 91 LEd 973, 985.

SEC v. *Joiner*, 320 U.S. 344, 88 LEd 88, 95.

Orser v. *U. S.*, 362 F2d 580, 584.

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Mims v. *U. S.*, 375 F2d 135, 148 (5th Cir.).

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U. S. v. *Raub*, 177 F2d 312 (7th Cir.).

U. S. v. *Manuszak*, 234 F2d 421, 424 (3rd Cir.).

Brooks v. *U. S.*, 240 F2d 905, 906 (5th Cir.).

Townsend v. *Sain*, 372 U.S. 293, 311.

28 U.S.C.A. 2255.

III

Does an Alleged Instruction on the Law Constitute a Violation of Petitioner's Constitutional Rights to a Trial by Jury?

Roe v. *U. S.*, 5th Cir., 287 F2d 435.

IV

Is a Denial of Access to Certain FBI Records a Denial of Petitioner's Constitutional Rights?

Dennis v. *United States*, (1966) 384 U.S. 855, 875.

STATEMENT OF THE CASE

The Petitioner was convicted on five counts for violation of the antifraud provisions of the Securities Act of 1933 and eight counts of mail fraud. The conviction was appealed and affirmed by the Tenth Circuit, 364 F2d 127, Certiorari denied 385 U.S. 1014.

Petitioner thereafter filed a civil suit in the United States District Court for the District of Kansas seeking to compel the United States to produce copies of all the evidence presented to the grand jury; the presentence report; all files, notes, and working papers of the Securities Exchange Commission and the Federal Bureau of Investigation relating to Petitioner; all conversations, confessions, and statements which were recorded mechanically or electronically relating to him by any Government agency; and all documents relating to the selection of veniremen in the United States District Court for the District of Kansas for 1964 and the twenty-five years preceding.

The Petitioner also filed an application for relief under 28 U.S.C.A. 2255. Both these actions were consolidated and the District Court held a pretrial hearing. At that time the District Court reviewed the twenty grounds relied on by the Petitioner for relief and concluded that none of the issues raised presented grounds for which relief "may or should be granted" under section 2255, and dismissed the motion.

The Tenth Circuit heard the cases on appeal and affirmed the ruling of the District Court in dismissing the 2255 proceeding.

The foregoing facts were taken from the opinion of the Tenth Circuit, Exhibit A of the Appendix, and fairly relate the facts involved now.

STATEMENT OF FACTS

The instant Petition relates solely to the civil proceeding involving 28 U.S.C.A. 2255 and provides very little information on the criminal trial originally held. Additionally, since the record will not be sent to this Court, it seems extremely important that a comprehensive Statement of Facts be provided.

Donald R. Elbel, Petitioner herein, graduated CUM LAUDE from Harvard in 1941. He received a *personal* Presidential Citation for his outstanding efforts in World War II.

Coffeyville Loan and Investment

After gaining considerable experience in other endeavors, Elbel formed Elbel Enterprises, Inc., which eventually became the principal owner of Coffeyville Loan and Investment Company, hereafter referred to as CLIC.

Arizona Savings and Loan

As the result of the unwarranted closing of Arizona Savings and Loan from which CLIC had substantial loans, CLIC was forced into a Chapter X proceeding.

An agreement of June 9, 1959, was entered into by several of the principal parties. If such agreement had been honored, CLIC would have experienced no difficulty. This fact was established by the Respondent's own CPA at the criminal trial.

Arizona Indictment

In July 1959, Elbel and seven others were indicted in Phoenix. The Trial Court there ultimately dismissed the indictment. The Ninth Circuit upheld the District Court.

Kansas Indictment

On September 20, 1962, the Petitioner was indicted in Kansas on 23 counts of alleged mail fraud and securities violations.

It had been the practice of CLIC to pay more interest than was being paid by other savings concerns and the banks in Kansas. After the Petitioner acquired control of CLIC, he made no changes to existing practices but merely continued them.

In the indictment, it was alleged that the deposits accepted by CLIC were offers and sales of securities in violation of the securities act because of alleged statements made to the depositors.

The identical facts were then re-alleged in the mail fraud counts.

Offer of Plea

Elbel refused an offer of the Respondent to accept a plea to one count—and went to trial on all counts.

Conviction

He was convicted of 5 SEC and 8 Mail counts.

Sentence

The Trial Court sentenced Elbel to 5 years for the SEC counts. The Court then divided the 8 mail counts into two groups and sentenced Elbel to FIVE years on EACH group. All sentences were consecutive. This made an effective FIFTEEN year sentence. In a Rule 35 proceeding, the Trial Court has conceded that the sentence is excessive. See Exhibit B of the Appendix.

Appeal

An appeal was taken to the Tenth Circuit and affirmed at 364 F2d 127. Certiorari was denied at 385 U.S. 1014.

Motion for New Trial

A Motion for New Trial was filed in April, 1967, based upon newly discovered evidence, and the motion was denied. An appeal was taken from such denial, but it was never perfected for reasons unknown to present Counsel.

Liquidation

Elbel has paid nearly all of his creditors and has placed his personal worth into the CLIC liquidation.

As a matter of interest, Arizona Savings and Loan liquidated out at ONE HUNDRED TWO percent and actually paid out NINETY percent.

Thus far, CLIC has paid out FORTY percent to its depositors.

Anti-Trust Proceeding

Anti-trust proceedings are pending in Phoenix, Arizona. The anticipated successful conclusion of such proceedings will result in a complete pay-out for CLIC depositors.

Initial Civil Case

On October 15, 1969, Elbel filed suit seeking to compel the production of certain records, information and evidence in the files of the Respondent or its agencies. This cause was assigned Number T-4671.

Subsequent Civil Case

On November 14, 1969, Elbel filed a 117 page application for relief under 28 U.S.C.A. 2255. This cause was assigned Number L-1044.

Consolidated

The two cases below were consolidated by the Trial Court.

First Hearing

The first hearing in the consolidated cases was on November 14, 1969.

At such hearing, the Court ordered the Respondent to respond to the 2255 application.

Pre-Trial Conference

On December 22, 1969, Judge Templar set the consolidated cases down for "pre-trial" for December 31, 1969, at 9:30 A.M.

Answer

The Respondent filed a 65 page Answer on December 30, 1969, with the hour of service not shown.

At the "pre-trial" of December 31, 1969, it was indicated that the Answer had been received by Elbel's Counsel at 3:30 or 4:00 P.M. on the day before "pre-trial." The Respondent did not deny such time of service.

"Pre" Pre-Trial

The District Court had requested that the respective counsel meet prior to the "pre-trial." Such meeting was held on the afternoon of December 30, 1969, and lasted about four hours.

At such "pre" pre-trial, the respective counsel covered all 20 issues raised in the 2255 motion, plus the additional motions pending in the consolidated cases. General agreement was reached as to which issues required "live witnesses", and a listing of the "live witnesses" involved was made.

Pre-Trial

The "pre-trial" commenced on December 31, 1969.

Converted into Hearing

It immediately became apparent to Elbel's Counsel that the Trial Court intended to make a full-fledged "hearing" out of what had been set down as a "pre-trial conference."

First Request for Continuance

When the aim of the Trial Court became apparent, Elbel's Counsel requested a continuance since he was not prepared for a full-fledged hearing. The Trial Court refused.

Second Request for Continuance

Counsel then reminded the Court that the SIXTY-FIVE page Answer of the Respondent had been served on him less than 16 hours previously and he had had no opportunity to study the Answer or research the legal responses raised therein. A second request for continuance was made. Again, the Court refused.

Third Request for Continuance

Elbel's Counsel finally requested a continuance for the third time, and it was refused.

Motion to Disqualify

Petitioner's Counsel then moved the Trial Court to disqualify himself for prejudice, citing several reasons.

In support of such motion, an affidavit executed by Michael C. Boerner, attorney at law, was filed with the Court.

The Boerner affidavit recited that Judge Templar had told Affiant that "Elbel was as guilty as hell".

The Court denied making such a statement and denied the motion to disqualify.

Request to Dismiss

Elbel's Counsel then requested the Court to allow him to dismiss the application for 2255 Relief. The Court refused such request.

Rulings on Collateral Motions

On February 3, 1969, the Trial Court denied:

(a) Motion to produce Grand Jury records,

(b) Motion to permit inspection of jury venire records,

(c) Motion for production of pre-sentence report,

(d) Motion for production of SEC records,

(e) Motion for production of FBI records, and

(f) Application for release on bail.

Denied 2255 Application

On February 5, 1969, the Trial Court denied all relief sought by the 2255 application, finding no need for evidentiary hearing or further hearing whatsoever.

Subsequent Appeal

An appeal was taken to the Tenth Circuit and duly argued. The Court of Appeals affirmed the Trial Court based on the following propositions:

(a) Instructions given to jury are not subject to collateral attack,

(b) Issues disposed of on direct appeal are not subject to collateral attack,

(c) Questions relating to sufficiency of evidence are not reviewable in postconviction proceedings,

(d) Alleged trial errors, reviewable on appeal, are not subject to collateral attack,

(e) The sufficiency or validity of the indictment is not reviewable in a section 2255 motion,

(f) New evidence relating to counsel's advice was not before the original Trial Court, was not raised on appeal, and cannot be considered in a 2255 proceeding,

(g) The makeup of the grand and petit juries can not be challenged now,

(h) The fifteen year sentence was not vindictive because of its length (But see Exhibit B of the Appendix re sentence),

(i) Original trial counsel's errors did not make the trial a mockery, sham or farce,

(j) No error in use of "pre-trial" to dispose of Petitioner's claims, and

(k) Affidavit for bias or prejudice was untimely filed.

No Ruling on Constitutional Issues

The Tenth Circuit made no ruling on the constitutional issues before it, but, in effect, held—

(a) All issues had been considered on appeal, or

(b) Could have been considered on appeal, and could not now be considered in a 2255 proceeding.

ARGUMENT

I

Did the Trial Court's Failure to Conduct a Hearing Require the Appellate Court to Accept As True All Facts Well Pleaded in the 2255 Motion?

The Trial Court dismissed all twenty grounds set forth in the Petitioner's 2255 motion at a pre-trial conference, no former hearing ever being held.

The Petitioner contends that under the procedure governing 2255 motions, the Tenth Circuit was then required to ACCEPT AS TRUE all of the facts set forth in the motion, including exhibits and affidavits. See *U. S.* v. *Rosenberg*, 2nd Cir., 200 F2d 666, 668:

> "These limitations on the function of a petition under 2255 must be borne in mind in considering the present appeals.
>
> "Since Judge Ryan held NO HEARING at which testimony could be presented, it is NECESSARY to treat as TRUE all facts stated in the petitions and in accompanying affidavits and exhibits, and to DISREGARD all contrary statements of fact in the government's affidavits."

Or, see *U. S.* v. *Wilkins*, 348 F2d 844, 865, where the Second Circuit held the District Court's holdings not "entitled to the slightest credulence" when it fails to hold plenary hearings or examine trial transcripts "nor engage in any other factual inquiries."

This Court has similarly ruled in *Williams* v. *Kaiser*, 323 U.S. 471, 89 LEd 398, holding at l.c. 401:

> "The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And

> the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. HENCE WE MUST ASSUME THAT THE ALLEGATIONS OF
>
> THE PETITION ARE TRUE." (Emphasis supplied)

This Court has long held that the ground rules for habeas corpus proceedings will generally govern in a 2255 involvement.

Importance of Question

The importance of this question becomes apparent upon consideration of the proceedings below.

The Trial Court at page 1803 of the criminal trial transcript stated that following the advice of an attorney was a complete defense and instructed the jury in detail:

> ". . . you are instructed that if a man honestly and in good faith seeks advice of an attorney as to what he may do in the matter of issuing securities, such as Investment Certificates of a corporation, to investors responding to advertisements of the corporation, and * * * honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could NOT be convicted of a crime which involved willful and unlawful intents, EVEN IF SUCH ADVICE WERE AN INACCURATE CONSTRUCTION OF THE LAW. * * *" (Emphasis supplied)

Attached to the 2255 proceeding was the affidavit of Mayor Joseph McDowell of Kansas City, Kansas (Exhibit C of the Appendix), in which the Mayor stated beyond a shadow of a doubt the ABSOLUTE RELIANCE by the Petitioner upon the advice of his attorney.

Thereafter, the failure of the Tenth Circuit to acknowledge the truthfulness of such affidavit completes the ring

of illegality surrounding Petitioner's continued confinement.

The reasoning of *U. S.* v. *Sanders*, 373 U.S. 1, 10 LEd2d 148, is clarified in *Kaufman* v. *U. S.*, 394 U.S. 217, 22 LEd2d 227, 236, where this High Court has ruled:

> "But we there recognized that federal habeas relief is not limited by that rule (concerning trial errors, etc.) 332 US, at 182, 91 L Ed at 1989; see also Hill v United States, supra, at 428, 7 L Ed 2d at 421 (1962). Later, in Townsend v Sain, 372 US 293, 311-312, 9 L Ed 2d 770, 784, 785, 83 S Ct 745 (1963), we pointed out the vital distinction between the appellate and habeas functions which requires that habeas relief not be denied solely on the ground that relief should have been sought by appeal to prisoners alleging constitutional deprivations:
>
> "The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the gravest allegations . . . . The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." (Emphasis supplied)

Respondent's counsel below argued that the proposed affidavit is NOT NEW. It was also argued that the evidence could have been presented at the criminal trial.

Since the Trial Court held NO evidentiary hearing, this Court, as well as the Tenth Circuit, must accept the AFFI-

DAVIT as FACT! And, the failure to present it at the original trial is meaningless if any weight is to be given by the lower courts to the edict of *Kaufman,* supra.

The affidavit clearly shows for the first time that Petitioner STRICTLY followed the advice of his counsel, a defense sufficient for relief had it been offered at time of trial. Based on *Kaufman,* these facts may be raised ANEW. Certainly the failure to allow Petitioner to put this NEW evidence before the Court in a full and fair evidentiary hearing on the 2255 Motion is an abuse of the Trial Court's discretion and denies Petitioner the Due Process of Law guaranteed by the 5th Amendment.

II

Is the Petitioner Prohibited from a Collateral Attack on an "Instruction" Which Clearly Violates His Constitutional Right?

The Petitioner contends that he was effectively denied a trial by jury since the Trial Court REMOVED from the Jury its *sole and exclusive right* to DETERMINE ALL FACTS.

At page 1773 of the criminal transcript, the Trial Court instructed:

> "I INSTRUCT you that *such investment certificates* WERE SECURITIES as that term is defined in the Security Act of 1933."

There was NO crime unless investment certificates WERE, in fact, SECURITIES under the appropriate act. So, the trial became a nullity because the Trial Court invaded the exclusive province of the jury and determined a PRIME FACT that only the jury could determine.

One of the leading cases on this point is *Roe* v. *U. S.,* 5th Cir., 287 F2d 435. In *Roe,* the crucial issue was

whether or not an "investment contract", involving oil, was a "security" so as to require registration with the SEC. The Court instructed the Jury at l.c. 440 as follows with emphasis supplied:

> "You are INSTRUCTED that (such assignments) are investment contracts and ARE, therefore, a SECURITY within the meaning of the law."

In ruling this point, the Fifth Circuit held at l.c. 440:

> "Thus we determine that, as a matter of law, the evidence of these transactions, if credited, would constitute the sale or delivery of an 'investment contract', hence a 'security' thereby requiring registration with the SEC. BUT THE IF IN 'IF CREDITED' IS A BIG ONE. By its very nature, it is the peculiar facts of the setting which turns the offer from a mere sale of property into a sale of a security. *That means that the trier of fact, here a jury, must determine the issue.* More than that, this being a criminal case in contrast to the more common injunction proceeding or damage suit under the Act, two principles inescapably apply,
>
> First, in Mr. Justice Jackson's words 'in a civil action * * * a preponderance of the evidence will establish the case * * * in a criminal case, (the evidence must) meet the stricter requirement of satisfying the jury beyond a reasonable doubt.' 320 U.S. 344, 355, 64 S.Ct. 120, 125. Second, and here more decisive, *no fact, not even an undisputed fact, may be determined by the Judge.* The plea of not guilty puts all in issue, even the most patent truths. In our Federal system, the Trial Court MAY NEVER INSTRUCT A VERDICT either in whole or in part. (Citing Cases) And yet, that is substantially what the Trial Judge did here on the crucial issue of whether these were investment contracts. *He instructed them flatly and without equivocation that they were.*
>
> This was no mere permissible expression of his opinion on what the evidence showed. For he translated

> this into positive action that if 'the investment contracts' were 'offered for sale' by defendants 'these defendants did engage in the sale of securities within the meaning of the Federal Securities Law.' *Neither as to the fraud counts* covered by Instruction 3 *nor as to the non-registration counts* (covered by Instruction 4 and 5) *did the Court ever submit the question whether these were investment contracts within the legal definition stated by the Court.*
>
> * * *
>
> In clear and understandable language the Judge should have told the jury that to convict it *must first find* that, within the definition of an investment contract given by the Court, these TRANSACTIONS were an INVESTMENT CONTRACT. Only then, did sale through the mail without registration become a federal crime." (Emphasis supplied)

A quick reference to a Supreme Court case cited in *Roe* gives a little broader outlook. In *United Brotherhood et al.* v. *U. S.*, 330 U.S. 395, 91 LEd 973, the Supreme Court held at l.c. 985:

> "No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under Sec. 6 of such association or organization for acts of its agents. *For a judge may not direct a verdict of guilty no matter how conclusive the evidence.* There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions, note 19 above, or on actual authorization or ratification of such acts, note 18."

As in *Roe*, here—ONLY if the document involved was included within the Securities Act could there be any violation of the Act. In the instant case, as in *Roe*, the Trial Court removed from the Jury its right of DETERMINING

A FACT of jurisdiction. Unless the Jury finds that "investment certificates" came within the meaning of the Securities Act, there could be no violation of that Act, and by the same token, the mails could not have been used in aid of any scheme.

The Trial Court's action was an ERROR OF SUCH MAGNITUDE that it cannot now be dismissed as "not harmful." This erroneous invasion of the rights of the Jury deprived the Petitioner of his Constitutional Right to be tried by a Jury of his Peers. One can only speculate what the Jury MIGHT HAVE DONE without that instruction.

Respondent argues at page 6 of its Answer that NO timely objection was made by Elbel to the instruction. To this, we state that whether 2,000 pages or 10,000 pages of testimony are involved, at NO place or in NO manner can the Respondent be relieved of its obligation. The *Respondent must prove* and the *Jury must find*, beyond a reasonable doubt, that the securities being sold came under the Act. *SEC* v. *Joiner*, 320 U.S. 344, 88 LEd 88, 95.

The Fifth Circuit, in other opinions, and other Circuits have considered this question and have ruled that a Trial Judge CAN NOT instruct on any fact! As the Fifth stated in *Orser* v. *U. S.*, 362 F2d 580, 584:

> "In a criminal case, ALL facts, including those NOT DISPUTED, are to be determined by the Jury." (Emphasis supplied)

For like holdings, also see: *Bryan* v. *U. S.*, 373 F2d 403, 407 (5th Cir.); *U. S.* v. *England*, 347 F2d 425, 431 (7th Cir.); *U. S.* v. *McKenzie*, 301 F2d 880, 882 (6th Cir.); *Mims* v. *U. S.*, 375 F2d 135, 148 (5th Cir.); *Byrd* v. *U. S.*, 342 F2d 939, 942 (note 9, D.C. Cir.); *U. S.* v. *Raub*, 177 F2d 312 (7th Cir.); and *U. S.* v. *Manuszak*, 234 F2d 421, 424 (3rd Cir.).

In *Brooks* v. *U. S.*, 240 F2d 905, the Fifth Circuit found at l.c. 906 that even telling a jury an officer could administer oaths was prejudicial and stated:

> "We agree for that all-sufficient reason that it deprived the jury of its function of determining whether or not, UNDER the evidence and as EXCLUSIVE JUDGES OF THE FACTS and of the CREDIBILITY of the WITNESSES, they believed beyond a reasonable doubt that Perry was an officer authorized to administer oaths in 1955 and thus VIOLATED appellants' constitutional right to a trial by jury as guaranteed by the Sixth Amendment." (Emphasis supplied)

The Respondent can find little solace in the fact that the Petitioner failed to raise this all-important question on original appeal. This Court has uniformly held that relief cannot be denied solely on the ground that relief should have been sought by appeal by the prisoner alleging constitutional deprivations. *Townsend* v. *Sain*, 372 U.S. 293, 311.

Furthermore, 28 U.S.C.A. 2255 states that a "motion for such relief (violation of the Constitution) can be made AT ANY TIME."

III

Does an Alleged Instruction on the Law Constitute a Violation of Petitioner's Constitutional Rights to a Trial by Jury?

In another instance, the Trial Court determined ANOTHER CRUCIAL FACT by instructing the jury as follows:

> "Falling within this category of mailings PROHIBITED by the statutes are mailings between the *defendant* and investors, between the *defendant* and his agents, where such mailings are caused to be made by the *defendant.*"

The Trial Court again FLATLY invaded the province of the jury and DENIED A JURY TRIAL to Elbel. The Trial Court fully and completely DETERMINED that the mailings in evidence WERE mailings "PROHIBITED by the statutes".

This left the jury with NO FUNCTION to perform because the Trial Court had usurped the POWER OF THE JURY.

It was clearly up to the jury to determine IF the mailings in question fell within the statute.

The Trial Court's instruction removed all doubt from the jury's minds when the instruction referred THREE times to the DEFENDANT. This instruction was not one of law. It was one which determined FACTS, all in violation of Petitioner's constitutional rights as shown in *Roe*, supra.

IV

Is a Denial of Access to Certain FBI Records a Denial of Petitioner's Constitutional Rights?

The Petitioner's counsel in the criminal trial requested that he be given access to certain FBI records.

Examination of the transcript will indicate Judge Arthur Stanley and Judge George Templar (both of the District of Kansas) ruled that "a case had been made" for the production of the pertinent FBI records.

Thereafter, Judge Templar ACTUALLY REVIEWED the FBI records "in camera", but denied Petitioner and his counsel access to such records.

The failure of a Trial Court to permit the Defendants to examine the witnesses' grand jury testimony resulted in reversible error in *Dennis* v. *United States*, (1966) 384

U.S. 855. The conclusive observations there made are equally applicable to inspection of FBI reports in the instant case. In *Dennis,* it is stated at page 875:

> "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made *ONLY by an advocate."* (Emphasis supplied)

In *Dennis,* it goes on to point out that the judge's ONLY function is to determine if a case has been made for "production". In the instant case, this determination had been made in favor of Petitioner by both Judge Stanley and Judge Templar. Hence, it follows that denial to allow the inspection by the defense counsel, where the "particularized need" for disclosure was already established, was a clear cut case of denial of Due Process.

It is not realistic under any circumstance to assume that the Trial Court's judgment as to the utility of material for SUPPRESSION or any other legitimate purposes, however conscientiously made, would exhaust the possibilities.

Additionally, since the Respondent has admitted that it used the same evidence against Petitioner in the Criminal Trial in this case as was supressed in the U.S. District Court in Arizona, he was entitled to an evidentiary hearing in order to get into an appellate record the TAINTED EVIDENCE involved. The Petitioner requested the Trial Court to have the Respondent produce such records, but the request was denied.

It is self-evident in face of the Rules of Criminal Procedure that the Trial Judge (Judge Templar) was in error when he examined the FBI records, but refused to so allow the Petitioner. Rule 12 (b) (4) of the Rules provides that a jury shall determine issues of fact arising in motions filed

before trial raising defenses or objections. Certainly, this was an issue of fact which should have been submitted to a jury for determination.

CONCLUSION

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit to the end that Petitioner's Application for Relief under Title 28, U.S.C.A., Section 2255 be approved.

.....

CHARLES C. SHAFER, JR.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

The undersigned, Charles C. Shafer, Jr., counsel of record for Petitioner, hereby certifies that the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit is submitted in good faith and is believed to be meritorious.

.....

CHARLES C. SHAFER, JR.

EXHIBIT A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 209-70 and 210-70

SEPTEMBER, 1970 TERM

DONALD R. ELBEL,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Kansas (D.C. ## L-1044 and T-4671)

Before LEWIS, Chief Judge, JOHN R. BROWN, Chief Judge*, and SETH, Circuit Judge.

PER CURIAM.

The appellant was convicted on five counts for violation of the antifraud provisions of the Securities Act of 1933 and eight counts of mail fraud. The conviction was appealed to this court and we affirmed in Elbel v. United States, 364 F.2d 127 (10th Cir.).

*Of the Fifth Circuit, Sitting by Designation.

Appellant some time thereafter filed a civil suit in the United States District Court for the District of Kansas seeking to compel the United States to produce copies of all the evidence presented to the grand jury; the presentence report; all files, notes, and working papers of the Securities Exchange Commission relating to appellant; all files, notes, and working papers of the Federal Bureau of Investigation relating to appellant; all conversations, confessions, and statements which were recorded mechanically or electronically relating to appellant by any Government agency; and all documents relating to the selection of veniremen in the United States District Court for the District of Kansas for 1964 and the twenty-five years preceding. The FBI and the SEC were requested to advise the court whether electronic surveillance had been used in the investigation of petitioner.

The appellant also filed an application for relief under 28 U.S.C. § 2255. Both these actions were consolidated and the trial court held a pretrial hearing. At that time the court reviewed the twenty grounds relied on by the appellant for relief and concluded that none of the issues raised presented grounds for which relief "may or should be granted" ..der section 2255, and dismissed the motion.

After the FBI and the SEC filed affidavits that no electronic surveillance or monitoring and no mail covers or mail drops were used in the investigation of appellant's case, the court denied the action or motion to produce records. No argument has here been made concerning the trial court's denial of this motion for production of records and we must conclude that the appellant has abandoned this claim.

An examination of the issues raised in appellant's section 2255 motion shows that the trial court's denial or dismissal of the motion was correct, and we affirm.

To consider the points raised by petitioner, we find that in his first, tenth, eleventh, and twelfth points he is challenging the instructions given to the jury. We have held in Carrillo v. United States, 332 F.2d 202 (10th Cir.), that the instructions given by the trial court are not subject to collateral attack. Moreover, the appellant's tenth, eleventh, and twelfth points reassert the position taken on his direct appeal to this court. This is also true of the sixteenth point dealing with the admissibility of certain business records and the appellant's right to examine them. We determined these issues adversely to appellant in Elbel v. United States, 364 F.2d 127 (10th Cir.). Issues which are disposed of on direct appeal are not subject to collateral review. Baca v. United States, 383 F.2d 154 (10th Cir.).

The second, ninth, fourteenth, and fifteenth points challenge the sufficiency of the evidence. In his second point, for example, the appellant contends that the Government failed to prove that there was an offer or sale of securities by the use of interstate commerce or the mails. The appellant's attempt to characterize this issue as an unconstitutional application of the Securities and Mail Fraud Acts does not make this a constitutional question reviewable in a section 2255 motion; questions of the sufficiency of the evidence are not reviewable in a postconviction proceeding. Davis v. United States, 392 F.2d 291 (10th Cir.); Carrillo v. United States, 332 F.2d 202 (10th Cir.). As with the tenth, eleventh, twelfth, and sixteenth points, the fifteenth was also considered by this court on the direct appeal.

In the fifth, sixth, eighth, and in part the eleventh, points appellant asserts various alleged trial errors such as unfair comments by the prosecutor and the failure of the trial court to admit certain evidence tendered by the de-

fense. These alleged trial errors, reviewable on appeal, are not subject to collateral attack. Sunal v. Large, 332 U.S. 174; Kaufman v. United States, 394 U.S. 217; Baca v. United States, 383 F.2d 154 (10th Cir.).

In his fourth, seventh, fourteenth, and seventeenth points the appellant challenges the sufficiency of the indictment. It is well settled that the sufficiency or validity of the indictment is not reviewable on a section 2255 motion. Williams v. United States, 344 F.2d 264 (8th Cir.); Vincent v. United States, 361 F.2d 474 (8th Cir.).

Appellant urges that an affidavit of his attorney, who did not try his case, should have been received and considered by the section 2255 court. The affidavit relates to the advice of counsel during the time he performed the acts charged. There is no basis for the presentation of additional evidence in this manner. The issue of advice of counsel was before the original trial court, was not raised on appeal, and cannot be here considered.

The appellant also seeks to challenge the makeup of the grand and petit juries. He asserts that the jurors were drawn in 1964 from a five county area rather than from the whole State of Kansas. We find no merit in this contention. See United States v. Marcello, 423 F.2d 993 (5th Cir.). The selection was within the requirements of Smith v. Texas, 311 U.S. 128, and Glasser v. United States, 315 U.S. 60.

The appellant's next contention is that the fifteen year sentence imposed on him was vindictive because of its length. We find no merit in this argument as the sentence was well within the limits authorized by the statutes under which appellant was convicted. See United States v. McElreath, 412 F.2d 847 (10th Cir.); Smith v. United States, 273 F.2d 462 (10th Cir.); Holmes v. United States, 134 F.2d 125 (8th Cir.).

In his nineteenth point the appellant argues that it was a constitutional error for the trial court to refuse to provide him or his counsel with a copy of the presentence report. However, it was clearly within the discretion of the trial court whether to provide the defense with a copy of the presentence report, and the refusal of the trial court to do so is not reversible error. Williams v. Oklahoma, 358 U.S. 576; Cook v. Willingham, 400 F.2d 885 (10th Cir); Thompson v. United States, 381 F.2d 664 (10th Cir.).

The appellant's last contention is that he was denied his right to the effective assistance of counsel. There is no allegation that the representation was such as to make the trial a mockery, a sham, or a farce. Instead this claim is based on the alleged errors cited above. In the light of this court's decisions in Garrison v. Patterson, 405 F.2d 696 (10th Cir.); Johnson v. United States, 380 F.2d 810 (10th Cir); Nutt v. United States, 335 F.2d 817 (10th Cir.), and Frand v. United States, 301 F.2d 102 (10th Cir.), the court below was correct in denying relief based on this claim.

We see no error in the trial court's utilization of the pretrial procedure to clarify and dispose of groundless claims. Neither do we find any error in the trial court's refusal to permit the appellant to dismiss the petition without prejudice. The motion to dismiss was not made until after the court had ruled adversely to appellant on each of the twenty issues presented. Rule 41, Fed.R.Civ.P., makes it clear that the decision of whether to grant a motion to dismiss at that stage in the proceedings is discretionary with the trial court.

During the course of the pretrial conference the appellant made a motion to disqualify the trial judge on the grounds of bias or prejudice. In support of this motion the appellant filed an affidavit of one of his attorneys to the effect that the judge had expressed an opinion concerning

appellant's guilt. The trial judge did not recall having expressed such an opinion, but even if he had, the motion to disqualify was made too late. 28 U.S.C. § 144 provides that an affidavit of disqualification "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." No attempt was made to show why the affidavit was not filed within the time specified. The trial court properly denied the motion.

AFFIRMED.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,
vs.
DONALD R. ELBEL,
Defendant.
No. KC-CR-429

Order Denying Motion for Correction of Sentence

On June 12, 1964, defendant was sentenced following his conviction by a jury of some 13 counts of mail fraud and violation of anti-fraud provisions of the Security Act of 1933.

The basic facts of the case may be found in the opinion of the Court of Appeals for the Tenth Circuit, which court affirmed the conviction of defendant.

Defendant applied by way of a motion under provisions of 28 U.S.C. §2255, and undertook to attack the validity of the judgment and sentence of this Court. This Court conducted a pretrial in such proceeding and concluded that no issue was presented requiring further hearing, and

thereupon dismissed the motion. On appeal, this Court's order of dismissal was affirmed by the Court of Appeals.

On December 7, 1970, defendant, by letter, requested that the Court consider it as a motion under Rule 35 for correction of his sentence. By its order of December 7, 1970 (Doc. 206), the Court ordered the letter filed and directed that it be considered as a motion for correction of defendant's sentence.

The Court assigned the matter for hearing on Friday, January 9, 1971. Defendant appeared in person under order of the Court to produce him. His attorney likewise appeared and represented him before the Court.

After hearing the statements of counsel and receiving the evidence offered, the Court took the matter under advisement so that full consideration could be given to defendant's claim that the sentence imposed upon him was defective and illegal and required correction by the Court at this time.

The Court has reviewed the file and the record in the case and concludes that the motion must be denied. Rule 35 has quite a narrow function. While it permits the correction at any time of an illegal sentence, it does not authorize or permit a court to reexamine error occurring at trial or to examine and correct other proceedings prior to the imposition of sentence. *Hill* v. *United States*, 368 U.S. 424, 82 S.Ct. 408. Nor can it be used to go outside the record to entertain a collateral attack on the sentence. *Petro* v. *United States*, 368 F.2d 807. It is not a substitute for a direct appeal and ordinarily may not be based on grounds available for a direct appeal on or an appeal from the judgment. *Kyle* v. *United States*, 266 F.2d 670. And as to post-conviction remedies generally, see 50 F.R.D. 153.

If a sentence, as distinguished from a conviction is illegal, then it may be corrected. But a judge cannot, without vacating the conviction because of a legal defect found therein, change or modify, after the 120-day period of Rule 35 has expired, a sentence that is itself proper, legal and lawful as a sentence. *United States* v. *Marchese,* 341 F.2d 782, 788.

This Court must find that the sentence imposed on defendant is a legal one. It was carefully considered shortly after defendant's conviction was affirmed by the Court of Appeals and certiorari denied by the Supreme Court. The sentence was then found to be legal and defendant's request for a reduction was then denied.

Defendant's counsel has offered several propositions under which it is contended that the Court should and could vacate the sentence imposed.

It is asserted that the sentence imposed was a "general sentence," condemned by the Court of Appeals for the Tenth Circuit. An examination of the record discloses that the several sentences imposed on defendant were in no sense "general," the Court only stated its intention to impose sentences totalling overall, 15 years.

Defendant suggests the further contention that a heavy sentence was imposed upon him because he stood trial and was convicted after the Assistant United States Attorney had offered to accept a plea of guilty from defendant on any one count of the indictment and dismiss the rest. If such negotiations took place, it was not brought to my attention and such an incident had nothing to do with my consideration of the case. The cases cited in support of defendant's contention on this point are those wherein the sentencing judge made it clear that the sentence imposed was increased because the person convicted

had elected to stand trial. That was not true in Mr. Elbel's case.

The claim that Judge Stanley's endorsement on the indictment of the amount of bail fixed was in violation of the Rules of Criminal Procedure is without merit at this late juncture of the case.

I am not impressed with defendant's attempt to minimize the enormity of the fraud he perpetrated on many gullible people of modest means who could ill afford to be victimized as they were. Thousands of dollars were lost, even by defendant's calculation.

Since the defendant's motion for a reduction of sentence was denied, he has served, according to his statement, nearly 3 1/2 years of the total of 15 years for which he was sentenced. He is not yet eligible for parole consideration by the Board of Parole and will not be for a considerable time.

Defendant has heretofore presented a motion for reduction of sentence which was denied at the time of his commitment. An extensive Section 2255 Motion was considered and denied by this Court and the Court of Appeals. Defendant's case has been carefully considered on each occasion.

While reviewing the defendant's case, the Court has examined material developed from recent studies involving disparity of sentences for similar offenses committed by persons similarly situated throughout the various federal jurisdictions, and must conclude after much study and review that the cumulative, successive sentences imposed on defendant in this case appear to be unduly harsh as compared to sentences in other cases of a like character. The Court now is without power to resentence defendant Elbel and because the sentences imposed are not illegal,

cannot modify, change or reduce them. *Egan* v. *United States*, 268 F.2d 820, 823.

The Court does, however, recommend that favorable consideration be given the defendant on an application for executive clemency in order to afford him relief from what the Court now considers to be sentences that were greater than those imposed by the great majority of courts in the judicial system for similar offenses. As was held in the case of *Ex Parte Grossman*, 267 U.S. 87, 120-121, "the administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."

The motion must be denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 27th day of January, 1971.

/s/ George Templar
United States District Judge

EXHIBIT C

Affidavit of Joseph McDowell

JOSEPH McDOWELL, being first duly sworn according to law, deposes and says: That he is now, and at all times mentioned in this affidavit, an attorney at law duly licensed to practice law in the State of Kansas; that he resides at 2100 Washington Boulevard, Kansas City, Kansas.

Affiant further avers that Attorney Morris Shenker of St. Louis, Missouri was employed as attorney by Donald R. Elbel to represent said Elbel pursuant to an indictment filed in the United States District Court for the District of Kansas on September 20, 1962, in that certain criminal

action lately pending and entitled "United States of America v. Donald R. Elbel, Criminal Case No. K.C.-428"; that this affiant was not employed as attorney by Donald R. Elbel to represent said Elbel in said criminal proceedings, although affiant did, as local counsel, appear of record and assist Attorney Murray Randall of St. Louis, Missouri, who acted as chief defense trial lawyer during the trial of said criminal case, in the absence of said Attorney Morris Shenker. That this affiant was in attendance and present at all times during the trial of said criminal case and recalls quite clearly the manner in which the defense of said Elbel was managed and conducted during said trial.

Affiant further avers that he is familiar with the so-called "Investment Certificates" authorized to be issued by the laws of Kansas, prior to the year 1960, having theretofore served as a State Senator in the Kansas State Legislature; that under the then existing law the interest payable on such "certificates" was mandatory and must be paid even though the issuing company may have been operating its business at a loss; that dividend payments on such "certificates" are not authorized by Kansas Law; that such "certificates" did not constitute shares or evidence of ownership in the issuing company, nor did they embrace ownership in equity or right to participate in the management of the issuing company; that such "certificates" were not defined as "securities" under the then existing laws of Kansas; that such "certificates" were neither pledgeable nor negotiable per se.

Affiant further avers that during the time the said Donald R. Elbel was president of the Coffeyville Loan and Investment Company, Inc., and prior to the return of the indictment in said criminal case, he made an extensive study of the so-called "investment certificates" and the use of the same by various companies, including the Coffey-

ville Loan and Investment Company, Inc., that as an attorney employed by Elbel Enterprises, Inc., he furnished legal advice to the Elbel interests with respect to the legality of such certificates and their use, which advice was strictly followed; that this affiant found nothing illegal about the issuance of said "investment certificates" during the tenure of the said Donald R. Elbel as president of the Coffeyville Loan and Investment Company, Inc., and that the issuance of said "investment certificates" were fully authorized in the manner prescribed by the laws of Kansas and was not subject to the jurisdiction of the United States or any of its regulatory agencies.

Affiant finally avers that should any legal proceeding be instituted to set aside the convictions and judgments obtained in said criminal case, and if he were called as a witness in any such proceeding he would testify and give specific details relative to any and all of the averments made by him in this affidavit, and that he would have so testified had he been called as a witness at or during the trial of the aforesaid criminal case or action.

Further affiant sayeth not.

/s/ Joseph H. McDowell,
Joseph McDowell, Affiant

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1423

DONALD R. ELBEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of five counts of securities fraud (15 U.S.C. 77q(a)) and eight counts of mail fraud (18 U.S.C. 1341). He was sentenced to a total of fifteen years' imprisonment. The court of appeals affirmed with an extensive opinion. 364 F. 2d 127 (C.A. 10), certiorari denied, 385 U.S. 1014.

Petitioner subsequently filed a civil suit in which he sought to compel the United States to produce

numerous documents and other material from various agencies. He also filed a motion under 28 U.S.C. 2255 alleging twenty grounds for relief. The district court consolidated these matters and dismissed them without a hearing. The court of appeals affirmed (Pet. App. A).

In this Court petitioner contends that denial of the Section 2255 motion was erroneous because the trial judge had improperly instructed the jury that the investment certificates at issue were securities within the meaning of the pertinent statute; because he was improperly denied access to certain F.B.I. records and grand jury testimony; and because an affidavit of counsel, alleged to be newly discovered, shows that petitioner had followed counsel's advice in doing the criminal acts and thus lacked the requisite criminal intent. The court of appeals correctly held that such issues were not properly cognizable on collateral attack. See *Kaufman* v. *United States*, 394 U.S. 217.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

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